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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of:	)	
	)	
800 Data Base Access Tariffs and the	)	**CC Docket No. 93-129**
	)	
800 Service Management System Tariff	)	
	)	
	)	
and	)	
	)	
Provision of 800 Services	)	**CC Docket No. 86-10**

MCI OPPOSITION TO APPLICATION FOR REVIEW

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September 8, 1997

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SUMMARY

U S West seeks Commission review of the Common Carrier Bureau's Refund Order, arguing that the Bureau erred in not allowing U S West to reduce its refund liability with a sharing offset. The Commission should deny U S West's application for review because it fails to demonstrate any basis, as required by Section 1.115(b)(2) of the Commission's rules, for overturning the Bureau's decision.

The Bureau's decision to deny sharing offsets is fully consistent with the Communications Act and with the Commission's rules and orders. Pursuant to Section 204(a) of the Act, the Commission has the authority to require a refund of amounts collected pursuant to unlawful tariff provisions. Given that the Commission has determined that the LECs' rates were unlawful to the extent that they exceeded PCIs corrected for the disallowed data base costs, the Bureau's decision to require refunds of all above-cap amounts is consistent with Section 204(a) and the 800 Data Base Reconsideration Order. Further, there is no basis for U S West's contention that it has "already refunded" a portion of the overcharges through the sharing mechanism; the Commission has emphasized that there is a clear distinction between refunds and sharing.

The Bureau has correctly concluded that the proposed offsets are contrary to the Supreme Court's holding in Tennessee Gas, in that sharing offsets would constitute prohibited retroactive ratemaking. To the extent that U S West's overcharges increased its sharing obligation, the increased sharing was reflected in a reduced PCI in the next tariff year. Because of the prohibition against retroactive ratemaking, U S West cannot

now recover revenues lost due to increased sharing, either directly or through an offset to its refund liability. Moreover, U S West has overestimated the amount of additional sharing that accrued to the traffic sensitive basket customers that were overcharged. Because the Commission requires sharing to be distributed among the four baskets according to relative revenues, the majority of any increased sharing would have been allocated to the common line, trunking, and interexchange baskets.

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MCI OPPOSITION TO APPLICATION FOR REVIEW

I. Introduction

Pursuant to the Commission's Public Notice,[1] MCI Telecommunications Corporation (MCI) hereby submits its opposition to the Application for Review filed by U S West on July 28, 1997, in the above-captioned docket. U S West seeks Commission review of the Common Carrier Bureau's Refund Order,[2] arguing that the Bureau erred in not allowing U S West to reduce its refund liability with a sharing offset. The Commission should deny U S West's application for review because it fails to demonstrate any basis, as required by Section 1.115(b)(2) of the Commission's rules, for

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[1]62 F.R. 44692-44693, August 22, 1997.

[2]In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, Memorandum Opinion Order, CC Docket No. 93-129; 86-10, June 26, 1997 (Refund Order).

overturning the Bureau's decision. The Bureau's decision to deny sharing offsets is fully consistent with the Communications Act and with the Commission's rules and orders.

II. Background

In the 800 Data Base Order, the Commission disallowed certain costs that the LECs claimed to be exogenous when they introduced their 800 data base service in 1993,[3] and ordered the price cap LECs to reduce their traffic-sensitive PCIs on a going-forward basis by the amount of the disallowed costs.[4] Subsequently, in the 800 Data Base Reconsideration Order,[5] the Commission ordered the LECs to refund overcharges collected pursuant to the inflated PCIs that were in effect between 1993 and 1996. The Commission instructed the LECs to file their refund plans within 30 days of the release of the 800 Data Base Reconsideration Order, and delegated to the Common Carrier Bureau the authority to ensure the proper payment of these refunds.[6]

The LECs' refund plans were generally consistent with the refund methodology prescribed by the 1993-96 Annual Access Tariff Order, which was released the day after

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[3]In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket Nos. 93-129 and 86-10, Report and Order, released October 28, 1996, at ¶¶ 306-317 (800 Data Base Order).

[4]Id. at ¶316.

[5]In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket Nos. 93-129 and 86-10, Order on Reconsideration, released April 14, 1997 (800 Data Base Reconsideration Order).

[6]Id. at ¶¶50-52.

the 800 Data Base Reconsideration Order.[7] First, the LECs recalculated their 1993-1996 PCIs to determine the PCIs that would have been in effect but for the exogenous cost increases that the Commission found to be unlawful. Because the 1993 exogenous cost increases affected only the LECs' traffic sensitive PCIs, the LECs generally did not need to correct their PCIs for the common line, trunking, or interexchange baskets.[8] If an API was above the corrected PCI, the LECs computed the refund amount by calculating the percentage by which the API exceeded the PCI and multiplying this percentage by the basket revenue.

Five LECs, Bell Atlantic, NYNEX, Pacific Bell, SWBT, and U S West, included an additional step in their refund calculations that was not permitted by the 1993-96 Annual Access Order's refund methodology. These LECs reduced their proposed refund to reflect a "sharing offset," arguing that they had already refunded a portion of the overcharges to their customers through the sharing mechanism.[9] U S West, for example,

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[7]In the Matter of 1993 Annual Access Tariff Filings; GSF Order Compliance Filings; 1994 Annual Access Tariff Filings; 1995 Annual Access Tariff Filings; 1996 Annual Access Tariff Filings, Memorandum Opinion and Order, CC Docket No. 93-193, Phase 1, Part 2; CC Docket No. 94-65 at ¶¶97-105 (1993-1996 Annual Access Tariff Order).

[8]Because transport services were subsequently moved to the trunking basket, some LECs argued that the disallowed exogenous costs were also reflected in their trunking basket PCI.

[9]See, e.g., Refund Plan of U S West Communications Inc., CC Docket No. 93-129, filed May 14, 1997, at 6-7.

argued that it should be permitted to reduce its refund obligation for 1993 by 50 percent because its 1993 earnings were in the "50/50" sharing zone.[10]

In the Refund Order, the Bureau concluded that the LECs could not take sharing offsets. The Bureau found that sharing offsets would be contrary to the principles underlying Tennessee Gas,[11] where the party filing the rate "shoulder[ed] the hazards incident to its actions."[12] U S West now seeks review of the Refund Order, arguing that the Bureau misapplied Tennessee Gas.

III. The Bureau's Decision to Deny Sharing Offsets Is Fully Consistent the Communications Act, the Price Cap Rules, and Commission Precedent

Section 204(a) of the Communications Act gives the Commission the authority to require a refund of amounts collected pursuant to unlawful tariff provisions. After suspension and investigation of a tariff, the Commission may require the carrier to refund "such portion of such charge for a new service or such charges as by its decision shall be found to be not justified."[13]

The Commission specifically contemplated the continued exercise of its Section 204(a) authority under price caps, separate and independent of the operation of sharing mechanism. The initial decision adopting price cap regulation for incumbent LECs

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[10]Id.

[11]Federal Power Commission v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962).

[12]Refund Order at ¶¶16-17.

[13]47 U.S.C. §204(a).

recognized the coexistence of four separate safeguards that would work to ensure the reasonableness of the LECs' rates: (1) the design of the price cap regime and the actual price cap index; (2) the sharing mechanism; (3) complaints; and (4) the ability to suspend and investigate rates.[14] The LEC Price Cap Order states that sharing exists only as an additional backstop mechanism to help ensure that the productivity targets do not produce unreasonably high overall rates.[15] Given the thousands of rate elements included in each basket, it is self-evident that at the gross level at which productivity factors and sharing operate, neither mechanism can speak to whether a specific element is priced reasonably. Furthermore, in the AT&T Price Cap Order, whose legal framework was specifically incorporated in the LEC Price Cap Order,[16] the Commission promised that "parties will continue to have the opportunity in both the tariff review and complaint process to challenge rates they consider unjust or unreasonable."[17] This "opportunity" would be meaningless if a particular rate was subsequently determined to be unlawful, but customers were denied refunds of the amount of overcharges. Such an outcome would be fundamentally inconsistent with the statutory foundations of Section 201-205, on which price cap regulation rests.

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[14]In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6822-26 (1990) (LEC Price Cap Order).

[15]Id. at 6836.

[16]Id., ¶¶402-406.

[17]In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3088 (1989) (AT&T Price Cap Order).

In addition to retaining authority to order refunds based on specific tariff investigations and complaints, the Commission also explicitly retained authority to order refunds for above-cap rates. In the 800 Data Base Order, the Commission found that the LECs' current rates were unlawful to the extent that they exceeded PCIs adjusted for the disallowed exogenous costs.[18] Then, in the 800 Data Base Reconsideration Order, the Commission found that the LECs' 1993-96 rates were similarly unlawful to the extent they exceeded PCIs adjusted for disallowed costs.[19] Given that the Commission found that the LECs' rates were unlawful to the extent they exceeded the corrected caps, the Bureau's decision to require the LECs' to refund all above-cap amounts is fully consistent with the 800 Data Base Order, the 800 Data Base Reconsideration Order, and Section 204(a) of the Act.

U S West asserts that the 800 Data Base Reconsideration Order contemplates that refund amounts will be calculated in light of "the practical effects of the price cap regime" and argues that sharing is one such "practical effect."[20] This argument is without merit. Under price cap regulation, the lawfulness of a LEC's rates depends in the first instance on whether they are above or below cap. The Commission may find above-cap rates unlawful when, as here, the LEC has presented no evidence to demonstrate the reasonableness of an API that exceeds the corrected PCI.[21] While

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[18] 800 Data Base Order at ¶¶306-317.

[19] 800 Data Base Reconsideration Order at ¶20.

[20] AFR at 8-9.

[21] See 47 C.F.R. §61.49(e).

sharing was part of the price cap system during the period under consideration, the level of sharing depends on overall LEC earnings and is therefore irrelevant to a determination of whether above-cap rates are lawful.

The Bureau's disallowance of sharing is not only consistent with Section 204(a) of the Act, the price cap regulations, and the 800 Data Base Order, but is fully consistent with applicable Commission precedent governing the computation of refunds under price caps. In the 1993-1996 Annual Access Refund Order, released the day after the 800 Data Base Reconsideration Order, the Commission outlined a detailed methodology for computing refunds under price cap regulation.[22] The 1993-1996 Annual Access Order required LECs that had inflated their PCIs to refund above-cap amounts in full;[23] it did not provide for sharing offsets or any retroactive adjustment of sharing amounts. Given this precedent, the Bureau stood on firm legal ground in disallowing such sharing offsets in this proceeding.

Further, there is no basis for U S West's argument that its refund liability should be reduced because it has "already refunded" a portion of the overcharges through the sharing mechanism.[24] As an initial matter, U S West overestimates the additional sharing that flowed to the customers that were overcharged as a result of its inflated traffic sensitive PCI. Under the Commission's price cap rules, sharing amounts are

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[22]Id. at ¶104.

[23]Id. at ¶¶97-105

[24]See, e.g., AFR at 6.

distributed among the baskets according to basket revenues.[25] The majority of any additional sharing would therefore have been assigned not to the traffic sensitive basket, where U S West charged above-cap rates, but to the other three baskets. Even if "sharing offsets" were consistent with the 800 Data Base Reconsideration Order, U S West's proposal would overstate the additional sharing that accrued to the customers that were overcharged.

More importantly, the Commission has consistently emphasized that a sharing obligation is distinct from a refund ordered pursuant to Section 204(a) of the Act.[26] Refunds are ordered when, as here, the Commission has found a rate to be unlawful. Sharing, on the other hand, does not rely on Section 204(a) or imply unlawfulness. Thus, prior sharing cannot be said to have "refunded" overcharges found unlawful in a tariff investigation initiated pursuant to Section 204(a) of the Act. Sharing is merely a backstop mechanism that the Commission adopted to ensure that the price cap LECs' overall rates were reasonable.

IV. Sharing Offsets Are Contrary to Tennessee Gas

In the Refund Order, the Bureau concludes that sharing offsets are "contrary to the principles underlying Tennessee Gas, where the party filing the rate 'shoulder[ed] the

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[25]See 1993-1996 Annual Access Order at ¶38.

[26]In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Order on Reconsideration, 6 FCC Rcd 2367, 2684 ("The LECs are correct in asserting that the sharing adjustment does not imply any unlawfulness, and does not constitute a 'penalty.'").

hazards incident to its actions.'"[27] U S West contends that the Bureau misapplies Tennessee Gas, arguing that "[t]he principle of [Tennessee Gas] is simply that a utility may not recoup undercharges to one set of customers by overcharging another group of customers."[28]

U S West reads Tennessee Gas too narrowly. The Supreme Court's holding that refunds for one group of customers cannot be offset by undercharges for other customers is based on the more fundamental principle that "the company cannot recoup its losses by making retroactive the higher rate subsequently allowed."[29] Any retroactive rate increase, not just an offsetting rate increase assessed on another group of customers, violates the "filed rate doctrine," under which a common carrier may only charge the rates covered by its tariff on file and in effect at a particular time.

U S West's proposed "sharing offset" would violate the filed rate doctrine. As the Bureau notes in the Refund Order, any increased sharing liability resulting from overcharges was implemented through one-time reductions to rates that otherwise would have been in effect in the next tariff year.[30] By claiming a sharing offset, U S West is in effect arguing that it should be permitted to increase its 1997-98 traffic sensitive PCI by the amount by which any additional sharing reduced its 1993-1996 PCIs. However,

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[27]Refund Order at ¶17 (citing Tennessee Gas, 371 U.S. at 153).

[28]AFR at 8.

[29]Tennessee Gas, 371 U.S. at 152-153.

[30]Refund Order at ¶17.

because of the prohibition on retroactive ratemaking, U S West cannot now increase its rates or offset a refund liability in order to recoup these lost revenues.

Moreover, U S West's method of calculating the sharing offset does in fact involve offsetting undercharges for other customers against its refund liability, which U S West concedes is contrary to Tennessee Gas. U S West argues that the entire amount of any increased sharing should be offset against its refund liability. However, under the Commission's rules for allocating sharing among the baskets, any additional sharing would have been distributed among all four baskets on the basis of relative basket revenues. Thus, only part of any increased sharing flowed to the traffic sensitive basket customers that paid above-cap rates; the majority of any increased sharing was reflected in reduced PCIs in the other baskets. Now, however, U S West is seeking to offset the refund owed to traffic sensitive basket customers by the full amount of any increased sharing. Pursuant to Tennessee Gas and the 800 Data Base Reconsideration Order,[31] however, U S West cannot offset these "undercharges" for services in the common line, trunking, and interexchange baskets against the refund owed to its traffic sensitive basket customers.

V. The Duration of the Investigation Does Not Provide a Basis For Grant of U S West's Application for Review

U S West argues that the Commission did not meet its statutory obligation to complete a tariff investigation within 15 months, and that U S West's refund liability

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[31] 800 Data Base Reconsideration Order at ¶17.

should be reduced accordingly.[32] U S West ignores the fact that arguments concerning the duration of the investigation were addressed in the 800 Data Base Reconsideration Order,[33] and the Commission delegated to the Bureau the authority to resolve only those questions not explicitly addressed in the 800 Data Base Reconsideration Order.[34] Relying on its decision in American Television Relay,[35] the Commission has already considered and dismissed arguments related to the duration of the investigation.[36] Further, it is clear that U S West was not harmed in any way by the duration of the investigation. While U S West's customers had to pay above-cap rates for almost four years, U S West only had to keep track of the amounts collected pursuant to the tariff provisions that were found unlawful.

Moreover, under Section 1.115(c) of the Commission's rules, no application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.[37] Because U S West did not argue in its refund plan that its refund liability should be reduced because of the duration of the investigation, the Bureau did not have the opportunity to address U S West's theory.

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[32]AFR at 10-13.

[33]Id. at ¶16.

[34]800 Data Base Reconsideration Order at ¶21.

[35]American Television Relay, 67 FCC 2d. 703.

[36]800 Data Base Reconsideration Order at ¶16.

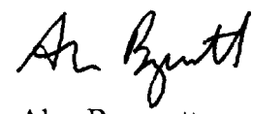
[37]47 C.F.R. §1.115(c).

Accordingly, the Commission should deny U S West's request to overturn or modify the Refund Order on the grounds that the duration of the investigation exceeded 15 months.

VI. Conclusion

For the above-mentioned reasons, the Commission should deny U S West's application for review.

Respectfully submitted,
MCI TELECOMMUNICATIONS CORPORATION



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September 8, 1997

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on September 8, 1997.

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CERTIFICATE OF SERVICE

I, Barbara Nowlin, do hereby certify that copies of the foregoing Opposition to Application for Review were sent via first class mail, postage paid, to the following on this 8th day of September, 1997.

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